IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRED M. DELLORFANO, JR.	:	CIVIL ACTION
	:	NO. 97-2709
v.	:	
	:	CRIMINAL ACTION
UNITED STATES OF AMERICA	:	NO. 92-27-1
	:	NO. 93-315
	:	

MEMORANDUM

Yohn, J. June , 1997

On August 28, 1995, this court granted defendant Fred M. Dellorfano Jr.'s 28 U.S.C. § 2255 motion to vacate his 1993 sentence arising out of his guilty plea to bank fraud and conspiracy to racketeer because the government violated the spirit of its plea bargain with Dellorfano. Dellorfano's case was then transferred to the Honorable John P. Fullam, who resentenced Dellorfano on all counts.

Presently, Dellorfano has filed a further motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 on the ground of ineffective assistance of counsel at resentencing. Specifically, Dellorfano argues that his counsel, Dennis P. Caglia, Esq., failed to contest findings of fact made at Dellorfano's original sentencing regarding Dellorfano's offense level enhancements of four points for leadership role and two points for obstruction of justice.

For the reasons that follow, the court finds that Dellorfano's present § 2255 motion is a "second or successive" motion as that term is applied in the Antiterrorism and Effective Death Penalty Act of 1996 (ATEDPA). Consequently, Dellorfano's motion will be dismissed because Dellorfano must first obtain authorization to proceed with his motion from the court of appeals.

I. BACKGROUND

On February 19, 1993, Dellorfano pleaded guilty to one count of racketeering, in violation of 18 U.S.C. § 1962(c), and two counts of bank fraud, in violation of 18 U.S.C. § 1344. Dellorfano, in pleading guilty, admitted that he and others embezzled approximately $5.6 million from an employee welfare benefit plan and that he defrauded a Massachusetts bank and trust company in connection with loans totalling approximately $850,000. At sentencing on July 19, 1993, Dellorfano was represented by Quentin Brooks, Esq.

After sentencing, Dellorfano appealed his conviction to the United States Court of Appeals for the Third Circuit. Among other issues on appeal, Dellorfano challenged his offense level enhancements of four points for his role as an organizer or leader, and two points for obstruction of justice. On June 20, 1994, the court of appeals rejected both claims. Regarding Dellorfano's leadership enhancement, the court concluded that there was "ample basis in the record to support the district

court's underlying findings[,]" and that the enhancement was supported by Dellorfano's stipulation in the plea agreement. United States v. Dellorfano, Civ. No. 93-1740, slip op. at 8 (3d Cir. June 20, 1994). Similarly, the court found that the evidence supported the district court's findings with respect to Dellorfano's obstruction of justice enhancement. Id. at 10. Subsequently, Dellorfano petitioned for a writ of certiorari,[1] which was denied on October 17, 1994.

Dellorfano then filed a motion to vacate sentence under 28 U.S.C. § 2255 on October 26, 1994. Dennis Caglia was appointed to represent him. On August 28, 1995, this court vacated his original sentence because the government violated the spirit of its plea bargain with Dellorfano. The plea agreement stated that Dellorfano and the government agreed that Dellorfano's criminal history category was category I. The court, however, sentenced Dellorfano based on a criminal history category II because Dellorfano had, after his guilty plea but before sentencing, pleaded guilty to state criminal charges in Massachusetts. Dellorfano's presentence investigative report had correctly recommended a criminal history category II but the government erred by agreeing with the higher criminal history category. In vacating Dellorfano's sentence, the court held that the government's statements in favor of the higher criminal

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1. On August 3, 1994, while the petition was pending, Dellorfano filed a § 2255 motion to vacate sentence. On August 9, 1994, the court denied Dellorfano's motion without prejudice pending disposition of his petition for writ of certiorari.

history category represented a breach of the plea agreement. In accordance with Supreme Court precedent, Dellorfano's case was then transferred to the Honorable John P. Fullam for resentencing.[2] The sentencing enhancement issues raised here were not raised in that motion.

On January 5, 1996, before his resentencing, Dellorfano filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Dellorfano argued that his RICO conviction violates the Double Jeopardy Clause of the Constitution because Dellorfano had previously been subject to a private civil RICO suit in the Western District of Pennsylvania.

On April 29, 1996, Judge Fullam resentenced Dellorfano to 110 months on one count of conspiracy to racketeering, and 110 months on two counts of bank fraud, to run concurrently. Dellorfano attempted to persuade Judge Fullam to reconsider his offense level enhancement, but Judge Fullam overruled Dellorfano's objection, stating that Dellorfano's offense level

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2. After the court vacated his sentence, Dellorfano moved to withdraw his guilty plea pursuant to Fed. R. Crim P. 32(e), which provides

> If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. 2255.

On April 1, 1996, the court denied Dellorfano's motion because Dellorfano failed to present any fair and just reason to allow him to withdraw his guilty plea.

adjustment was the law of the case. Judge Fullam noted that this court had determined the offense level enhancement at the time of the original sentencing and vacated Dellorfano's sentence on a ground unrelated to Dellorfano's offense level enhancement.

Dellorfano raised his sentencing enhancement claims in his direct appeal of his newly imposed sentence. On December 5, 1997, 1997, the Third Circuit rejected Dellorfano's claims, holding that "the areas that defendant put at issue have already been the subject of factual findings made by the district court that have been reviewed by this court, which found that the evidence of record supported the (stipulated) enhancements." United States v. Dellorfano, slip op. at 3 (3d Cir. Nov. 7, 1996). The court also stated that Dellorfano "has not set forth a sufficient basis for believing that any new information (much less, information that would have been unavailable to him prior to his sentence, also a requisite for relief) would undermine those findings." Id. On February 13, 1997, the court of appeals denied Dellorfano's petitioned for a rehearing, and on May 15, 1997, the deadline passed for Dellorfano to file a petition for writ of certiorari with the Supreme Court.

On May 16, 1996, this court denied Dellorfano's § 2241 petition (double jeopardy claim). Because Dellorfano had been resentenced subsequent to filing his § 2241 petition, the court held that § 2241 no longer served as the appropriate vehicle through which Dellorfano may attack his conviction. Accordingly,

the court construed Dellorfano's petition as a motion pursuant to 28 U.S.C. § 2255, and denied Dellorfano's claims on the merits.

On April 21, 1997, Dellorfano filed the present motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 on the ground of ineffective assistance of counsel at resentencing before Judge Fullam. Dellorfano argues that his counsel at resentencing, Dennis P. Caglia, Esq., failed to contest findings of fact made at Dellorfano's original sentencing regarding Dellorfano's offense level enhancement of four points for leadership role and two points for obstruction of justice. Dellorfano contends that he informed Caglia that the testimony of Michael Pagnozzi, Esq., was available to support Dellorfano's claim that he was not an organizer, leader, manager or supervisor of the conspiracy, and that an affidavit from Richard Egbert, Esq., was available to refute the government's argument on obstruction of justice. Dellorfano asserts that Caglia ignored his request to prepare a sentencing memorandum pointing out the evidence of Pagnozzi and Egbert, Caglia caused Pagnozzi to miss the sentencing hearing, Caglia did not inform Dellorfano of Pagnozzi's whereabouts, Caglia failed to follow numerous requests to prepare and present Pagnozzi's testimony and Egbert's affidavit, and Caglia failed to address the court concerning his conversation with Pagnozzi or proffer information with Egbert's affidavit.

II. DISCUSSION

The ATEDPA states that before a district court can consider a second or successive § 2255 motion, the defendant must obtain from a three judge panel of the court of appeals an order authorizing the district court to consider the motion. 28 U.S.C. § 2244, 2255. The court of appeals panel must grant or deny the order within 30 days, and may authorize the filing of a second petition only if the defendant makes a prima facia showing that the motion contains the following:

> (1) newly discovered evidence that, if proven and viewed in the light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255.[3]

Nowhere in ATEDPA is the term "second or successive motion" defined. However, the text of the ATEDPA reveals that the term "second or successive" motion refers to § 2255 motions that raise new claims, as well as to motions that raise claims previously presented in a prior application. Prior to the

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3. The Seventh Circuit has held that the new certification procedures in ATEDPA are mandatory. Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996) (unless court of appeals has given approval for its filing, the district court must dismiss second petition without waiting for response from government because district court lacks subject matter jurisdiction). However, the Second Circuit has indicated that rather than dismiss uncertified successive § 2255 petitions, the district court should transfer such petitions to the court of appeals for approval. Liriano v. United States, 95 F.3d 119, 122 (2d Cir. 1996).

enactment of the ATEDPA, a district court could dismiss a subsequent § 2255 motion where the defendant failed to allege new or different grounds for relief, termed a "second or successive" motion, or where the defendant raised new grounds that could have been raised in an earlier motion, termed an "abusive motion." Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986); 28 U.S.C. § 2255, Rule 9.[4] Under the ATEDPA, subsequent § 2254 petitions and § 2255 motions that raise claims not previously presented in a prior application are also termed "second or successive." See Christy v. Horn, 1997 WL 296402, at *3 (3d Cir. June 5, 1997); 28 U.S.C. §§ 2244(b)(2), 2255.

The ATEDPA's authorization requirements for "second or successive" § 2255 motions do not apply where the defendant's prior motion or motions were dismissed without prejudice for failure to exhaust state remedies. Christy, 1997 WL 296402, at *3. Similarly, the Seventh Circuit has held that a habeas petition filed after the district court has dismissed an initial application is not a second or successive petition where the

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4. The former Rule 9(b) provided as follows:

> **Successive motions**. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

28 U.S.C. § 2255, Rule 9.

district court dismissed the initial petition without addressing the merits because the initial filing was unintelligible or poorly developed, or the defendant failed to pay the requisite filing fee. See Benton v. Washington, 106 F.3d 162 (7th Cir. 1996).

Here, Dellorfano's initial § 2255 motion was decided on the merits. Similarly, Dellorfano's § 2241 petition was treated as a § 2255 motion, and was considered on the merits. Consequently, Dellorfano's present § 2255 motion is at least his second and arguably his third § 2255 motion and, hence, is a successive motion as that term is applied in the ATEDPA. See United States v. DeVaughn, 1997 WL 33267 (E.D. Pa. Jan. 21, 1997) (holding that defendant's § 2255 motion filed after resentencing following vacation of sentence on prior § 2255 motion was a second or successive motion requiring authorization from the court of appeals).

Where a defendant's § 2255 motion raises new claims that arise solely from events that occurred at resentencing, and hence such claims could not have been foreseen prior to resentencing, considerations of justice and fairness may compel the district court to consider such a motion as a first motion. Here, however, Dellorfano could have raised the substance of his present claim in either of his prior § 2255 motions because the operative events underlying the claim predate both of Dellorfano's prior motions. Albeit Dellorfano frames his instant claim as one of ineffective assistance of counsel at

resentencing, the crux of Dellorfano's claim is a challenge to this court's assessment at the original sentencing of Dellorfano's total offense level because to demonstrate that Caglia was ineffective at resentencing, Dellorfano must show prejudice. That is, Dellorfano must show that the court erred in the original sentencing in applying a four point enhancement for leadership role and two point enhancement for obstruction of justice. See Strickland v. Washington, 466 U.S. 668, 687, 690 (1984) (holding that to obtain relief under the Sixth Amendment for ineffective assistance by trial counsel, defendant must demonstrate that counsel's performance was deficient and that counsel's performance caused defendant prejudice). Moreover, Dellorfano was represented at his original sentencing by Quentin Brooks, Esq., and by Caglia in his first § 2255 motion. Therefore, there was no practical reason why Dellorfano could not have brought in his first § 2255 motion a claim that Brooks--by not challenging Dellorfano's offense level enhancement in the manner that he now seeks--provided Dellorfano with ineffective assistance of counsel at the original sentencing.[5] Consequently,

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5. Further, Dellorfano now cannot assert a claim that because Caglia failed to raise his offense level enhancement claim in the first § 2255 motion, Dellorfano was denied effective assistance of counsel in the first § 2255 proceeding. Prior to the ATEDPA, under the abuse of the writ analysis attorney error in a prior federal habeas petition could never serve as legitimate "cause" for raising a new claim in a second federal habeas petition. See Ritchie v. Eberhart, 11 F.3d 587 (6th Cir. 1993); Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992); Blair v. Armontrout, 976 F.2d 1130, 1139 (8th Cir. 1992); United States v. MacDonald, 966 F.2d 854, 859 n.9 (4th Cir. 1992); Harris v. Vasquez, 949 (continued...)

because Dellorfano could have raised the substantive issues that underlie his present § 2255 motion in a previous motion, considerations of justice and fairness do not compel the court to consider Dellorfano's present § 2255 motion as a first motion.[6]

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5. (...continued)
F.2d 1497, 1513-14 (9th Cir. 1990). That rule was derived from a combination of the principles announced in three separate Supreme Court decisions. First, a defendant has no constitutional right to effective assistance of counsel in the preparation of his original federal petition. See Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987). Second, in McCleskey v. Zant, 111 S.Ct. 1454, 1470 (1991), the Supreme Court held that the cause and prejudice test for an abuse of the writ analysis is the same as that for state procedural default. Third, in Coleman v. Thompson, 111 S. Ct. 2546, 2566 (1991), the Court held that inadvertent error by counsel in failing to file a state court habeas appeal on time does not constitute cause to excuse the procedural default. The Court explained that the "cause" that can excuse a default "must be something external to the petitioner, something that cannot fairly be attributed to him[,]" and that the only attorney error that is external to the petitioner is attorney error that constitutes a violation of petitioner's constitutional right to counsel. Id. Put together, these three cases revealed that counsel error in a prior § 2255 motion is not a factor external to the defendant because a defendant has no constitutional right to counsel in his first motion and, therefore, such counsel error cannot constitute "cause" under an abuse of the writ analysis.

Under the ATEDPA, counsel error in a prior § 2255 motion can never be the basis for a second § 2255 claim because the ATEDPA prohibits all subsequent § 2255 motions, except where the defendant makes a prima facia showing that the motion contains newly discovered evidence that if available at trial would have resulted in a not-guilty verdict, or that the motion relies on an applicable new rule of constitutional law that was previously unavailable. 28 U.S.C. § 2255. Obviously, if a defendant could get around the "second or successive" motion rule by asserting that counsel in a prior motion was ineffective in not having previously raised the defendant's new claim, the purpose of the successive motion provision would be defeated because defendants could evade the ATEDPA by framing their new claims under the guise of a ineffective assistance of § 2255 counsel claim.

6. In Burris v. Parke, 95 F.3d 465 (7th Cir. 1996) (en banc), (continued...)

III. CONCLUSION

In sum, Dellorfano's motion is a successive § 2255 motion and, therefore, Dellorfano first must seek authorization to proceed from the United States Court of Appeals for the Third Circuit.

An appropriate order follows.

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6. (...continued)
the Seventh Circuit held that the harsh consequences of the second or successive petition provision of the ATEDPA do not apply where a prior petition was decided before the date of enactment, and where application of the new law would be "retroactive in the sense of 'attaching new legal consequences to events completed before its enactment.'" Id., at 468 (quoting Landgraf v. USI Film Products, 511 U.S. 244 (1994)). Such retroactivity concerns are implicated where application of the new law would have the effect of "mousetrapping" the prisoner in that the new law would force him to forfeit a remedy that was previously available. Id. at 469. Here, such retroactivity concerns do not arise because even under prior law, Dellorfano's present claim would have been barred under an abuse of the writ analysis in that Dellorfano could have raised his offense enhancement claim in either of his previous § 2255 motions.

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ORDER

AND NOW, THIS DAY OF June, 1997, upon consideration of defendant's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255, **IT IS ORDERED** that defendant's motion, which is a "second or successive" motion, is **DENIED** without prejudice to defendant's right to seek authorization to proceed from the United States Court of Appeals for the Third Circuit.

BY THE COURT:

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William H. Yohn, Jr., Judge